SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2

Justice

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INDEX NO. 160321/2014

JOCELYN NOLTE,

Plaintiff,

MOTION SEQ. NO. 002

- v -

BRIDGESTONE ASSOCIATES LLC,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for RENEWAL AND REARGUMENT.

Upon the foregoing documents, it is order that the motion is decided as follows.

Defendant landlord moves for renewal and reargument of the decision, order and judgment of this Court dated October 4, 2017 and entered October 5, 2017 (the Order). The Order determined, in relevant part, that plaintiff's apartment, located 640 Fort Washington Avenue, Apt. 5B, New York, New York, was subject to rent stabilization pursuant to in *Roberts v Tishman Speyer Props., L.P.* (13 NY3d 270 [2009]) (*Roberts*), and that plaintiff was entitled to money damages for rent overcharges. To calculate those overcharges, this Court set the base date as October 22, 2010, four years prior to commencement of this action, and set the base date rent at $1,023.27 per month, because the defendant and its predecessor engaged in fraud in connection with rent increases for the apartment, its deregulation in 2008, and defendant's failure to reregister the apartment as rent-stabilized until January 2017. This Court also ruled that the base date rent

must be frozen until corrected rent registration statements were filed with the Division of Housing and Community Renewal (DHCR).

Defendant claims entitlement to renewal, based on the First Department's decision in *Taylor v 72A Realty Assocs., L.P.* (151 AD3d 95 [1st Dept 2017]) which, defendant contends, sets forth the correct calculation for setting the base date rent in a similar post-*Roberts* case. Renewal is denied. The *Taylor* case was decided on May 25, 2017, five months prior to the Order, and was considered by this Court in reaching its determination. This appellate decision does not, in any event, constitute a "change in the law that would change the prior determination" (CPLR 2221 [e] [2]). The facts of *Taylor* are very different from those herein. As the First Department noted in *Taylor*, "the owner in its motion for summary judgment disproved any fraud in the setting of rent when [the plaintiffs] first took occupancy. Plaintiffs' assertions of possible fraud in connection with the apartment improvements made in 2000 are pure speculation" (151 AD3d at 102-103). The owner of the apartment in the *Taylor* case provided documentation of the actual improvements to the apartment that justified a $458.58 increase to the rent upon its vacancy by the last rent-stabilized tenant (*id.*) Here, however, defendant provided no such proof to explain the $776.33 increase in rent in 2000.

Plaintiff challenges that aspect of the motion which seeks reargument pursuant to CPLR 2221 (d) as untimely, contending that this motion was e-filed on November 9, 2017, thirty-six days after the e-filing of the Order with notice of entry on October 5, 2017. CPLR 2221 (d) (3) provides that a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion with written notice of its entry." Defendant contends that the motion is timely, because the plaintiff also served a copy of the Order with notice of entry by regular U.S. mail on October 5, 2017 and thus, pursuant to CPLR 2103 (b) (2), defendant had an

extra five days to make the motion. Defendant also contends that the timely filing of a notice of appeal on October 18, 2017 permits the court to entertain a motion to reargue.

This motion was filed 35 days after the e-filing of the Order with notice of entry, not 36 days as plaintiff argues. "The day from which a time period runs is excluded in the computation" (Siegel, NY Practice, § 202 at 343-344 [5th ed 2010], citing General Construction Law § 20). However, plaintiff is correct that the motion is untimely by five days. This action was commenced under the mandatory e-filing program pursuant to which parties are required to serve their papers electronically (Uniform Rules for Trial Cts [22 NYCRR] § 202.5-bb [c][1]). That plaintiff also elected to serve a copy of the notice of entry by regular mail did not extend defendant's deadline to file a motion for reargument (*Woodward v Millbrook Ventures LLC* (148 AD3d 658 [1st Dept 2017]).

Despite the de minimis delay in making this motion, this Court has the discretion to reconsider its prior interlocutory rulings during the pendency of the action (*Liss v Trans Auto Sys.*, 68 NY2d 15, 20 [1986]; *Garcia v The Jesuits of Fordham*, 6 AD3d 163, 165 [1st Dept 2004]), especially where the movant has filed a timely notice of appeal and is not seeking an end-run around the strict appeal deadlines (*Leist v Goldstein*, 305 AD2d 468, 469 [2d Dept 2003]). Defendant's delay should also be excused as mandatory electronic filing is still relatively new. Indeed, the consensual electronic filing rules had provided that "a party may . . . utilize other service methods" (22 NYCRR § 202.5-b [f] [2] [ii]) and at least one court construed this language as allowing the recipient the benefit of the CPLR time frames (*Global Custom Integrations, Inc. v JDP Wholesale Enters., Inc.*, 40 Misc 3d 909 [Sup Ct, Westchester County 2013]).

Defendant contends that the court misconstrued the law and facts to find indicia of fraud, because defendant followed DHCR's deregulation precedent prior to the *Roberts* decision,

allegedly received no guidance from DHCR concerning re-regulation and rent registration filing until 2016, and relied on pre-base date, rent-stabilized rent history to assess the legal rent post-*Roberts*.

First, this Court did not, as defendant contends, rule that a mere allegation of fraud is sufficient to look beyond the four-year statute of limitations of CPLR 213-a. The Court of Appeals' decision in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. Of Rent Admin.* (15 NY3d 358, 366 [2010]), cited at pages 7 and 8 of the Order, makes this point very clearly. In the case at bar, plaintiff presented evidence to support her allegation of fraud, and none of this evidence was refuted by defendant.

Second, defendant takes issue with the court's finding that "[t]he apartment was illegally deregulated on September 1, 2008" (Order at 5). This Court recognizes that defendant did not know that the luxury deregulation of apartments in buildings receiving J-51 tax benefits was illegal until *Roberts* rejected, almost a year later, DHCR's 1996 administrative interpretation of the luxury decontrol and J-51 tax abatement laws. However, New York City landlords were certainly aware of its ramifications when the First Department ruled, in its August 2011 decision in *Gerstein v 56 7th Ave. LLC*, 88 AD3d 189, 198 [1st Dept 2001]), that *Roberts* had retroactive application. At the very latest, landlords had such knowledge in March 2012, when the appeal of the First Department's order in *Gerstein* was withdrawn (*see Taylor v 72A Realty Assocs., L.P.* (151 AD3d at 101 ["making it clear from that point forward that owners had an obligation to retroactively restore affected apartments to rent stabilization and register them"]). This Court did not fault defendant for failing to take action in 2008, 2009 or even 2012, but rather for waiting until January 2017, on the day its opposition to plaintiff's motion for summary judgment was due, to file registration statements for the apartment with DHCR.

Third, defendant contends that this Court erred in relying on the affidavit of Christopher J. Leahy, submitted by the plaintiff to establish that the large jump in rent, from $623.67 per month in 1999 to $1,400 per month in 2000, was not justified by any individual apartment improvements (IAIs). Defendant contends that Mr. Leahy's affidavit is speculative and merely raises issues of fact which cannot be determined on summary judgment. However, as the court previously noted, the affidavit in question was submitted by a contractor familiar with the cost of renovation projects in New York City, detailed in nature and completely unrefuted by the defendant. Indeed, plaintiff sought evidence of any IAIs for the apartment through discovery, but no documentation was ever forthcoming from defendant.

Finally, defendant takes issue with this Court's ruling that plaintiff's rent must be frozen at $1,023.27 per month until it files corrected registration statements with DHCR (Order at 9), contending that there is no statutory basis for extending a rent freeze beyond January 5, 2017. Defendant argues that section 26-517 (e) of the Rent Stabilization Law permits late registrations and prospectively eliminates the rent freeze. However, in *Matter of 215 W. 88th St. Holdings LLC v New York State Div. of Hous. & Community Renewal* (143 AD3d 652, 653 [1st Dept 2016]), the court stated:

> "RSC § 2528.4 provides that an owner who filed an *improper* rent registration is barred from collecting rent in excess of the base date rent, and is retroactively relieved of that penalty upon filing a *proper* registration only when 'increases in the legal regulated rent were lawful except for the failure to file a timely registration (emphasis added).'"

Having considered each of the defendant's arguments in support of reargument, this Court adheres to its prior determination in all respects.

Therefore, in light of the foregoing, it is hereby:

ORDERED that that aspect of defendant's motion seeking renewal of the Order is denied; and it is further

ORDERED that that aspect of defendant's motion seeking reargument of the Order is granted, and, upon reargument, the court adheres to its prior determination in all respects; and it is further

ORDERED that this constitutes the decision and order of the court.

7/19/2018
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE